

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 237

Short Title: Income Withholding for Restitution.

(Public)

Sponsors: Senators Allran; Harris, Forrester, Hartsell, Carpenter, Simpson, Kincaid, and Gunter.

Referred to: Judiciary I.

February 18, 1993

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE THAT INCOME WITHHOLDING MAY BE USED TO
3 SATISFY CRIMINAL RESTITUTION PAYMENTS AND TO PROVIDE A
4 PROCEDURE FOR WITHHOLDING INCOME.

5 The General Assembly of North Carolina enacts:

6 Section 1. G.S. 15A-1343(b1) is amended by adding a new subdivision to
7 read:

8 "(6a) Submit to income withholding for restitution payments. Withholding
9 of a defendant's income shall be done in accordance with Article 82A
10 of Chapter 15A of the General Statutes."

11 Sec. 2. Chapter 15A of the General Statutes is amended by adding a new
12 Article to read:

13 **"ARTICLE 82A.**

14 **"INCOME WITHHOLDING FOR RESTITUTION.**

15 **"§ 15A-1348. Definitions.**

16 The following definitions apply in this Article:

17 (1) Aggrieved Party. – The person who was a victim of the crime
18 committed by the defendant and for whose benefit the court ordered
19 restitution paid.

20 (2) Defendant. – The individual convicted of a criminal offense and
21 ordered to pay restitution as a condition of probation under G.S. 15A-
22 1343.

- 1 (3) Disposable Income. – Any form of periodic payment to an individual,
2 regardless of sources, including but not limited to wages, salary,
3 commission, self-employment income, bonus pay, severance pay, sick
4 pay, incentive pay, vacation pay, compensation as an independent
5 contractor, workers' compensation, unemployment compensation
6 benefits, disability, annuity, survivor's benefits, pension and retirement
7 benefits, interest, dividends, rents, royalties, trust income and other
8 similar payments, which remain after the deduction of amounts for
9 federal, State, and local taxes, social security, and involuntary
10 retirement contributions. However, Supplemental Security Income,
11 Aid for Dependent Children, and other public assistance payments
12 shall be excluded from disposable income. For employers, disposable
13 income means 'wage' as it is defined by G.S. 95-25.2 (16).
- 14 (4) Initiating Party. – The aggrieved party, the attorney for the aggrieved
15 party, a probation officer, or the clerk of superior court who initiates
16 an action, proceeding, or procedure as allowed by law for the
17 enforcement of an order to pay restitution as a condition of probation
18 under G.S. 15A-1343.
- 19 (5) Mistake of Fact. – The defendant:
20 a. Did not request that withholding begin, if withholding is
21 pursuant to a purported request by the defendant for
22 withholding; or
23 b. Is not the person subject to the court order to pay restitution as a
24 condition of probation named in the notice of withholding; or
25 c. Does not owe the amount of current restitution payments or
26 arrearages specified in the notice or motion of withholding; or
27 d. Has a rate of withholding which exceeds the amount of
28 restitution specified in the court order.
- 29 (6) Payor. – Any payor, including any federal, State, or local
30 governmental unit, of disposable income to a defendant. When the
31 payor is an employer, payor means employer as is defined at 29 USC §
32 203(d) in the Fair Labor Standards Act.

33 **§ 15A-1348.1. Withholding income for restitution payments.**

34 (a) Withholding Based on Delinquent or Erratic Payments. – Notwithstanding
35 any other provision of the law, when a defendant is ordered to pay restitution as a
36 condition of supervised or unsupervised probation pursuant to G.S. 15A-1343, and the
37 defendant is delinquent or erratic in making restitution payments, the district attorney,
38 the defendant's probation officer, or the aggrieved party may apply to the court that
39 ordered probation by motion for income withholding. The motion may be heard by any
40 judge entitled to sit in the court that imposed probation.

- 41 (1) The motion shall be verified and state, to the extent known:
42 a. That the defendant is under a court order to pay restitution as a
43 condition of probation and the information sufficient to identify
44 the order;

- 1 b. That the defendant is currently delinquent in making restitution
2 payments or that the defendant is erratic in making restitution
3 payments;
4 c. The amount of overdue restitution and the total amount sought
5 to be withheld; and
6 d. The name, location, and mailing address of each payor from
7 whom withholding is sought and the amount of the defendant's
8 monthly disposable income from each payor.
9 (2) The motion shall include or be accompanied by a notice to the
10 defendant stating:
11 a. That withholding, if implemented, will apply to the defendant's
12 current payors and all subsequent payors; and
13 b. That withholding, if implemented, will be continued until
14 terminated pursuant to G.S. 15A-1348.5.
15 (b) Withholding Based on Defendant's Request. – The defendant may request at
16 any time that income withholding be implemented. The request may be made either
17 verbally in open court or by written request.
18 (1) A written request for withholding shall state:
19 a. That the defendant is under a court order to make restitution
20 payments, and information sufficient to identify the order;
21 b. Whether the defendant is delinquent and the amount of any
22 overdue restitution payments;
23 c. The name of the aggrieved party for whose benefit restitution is
24 payable;
25 d. The name, location, and mailing address of the payor or payors
26 from whom the defendant receives disposable income and the
27 amount of the defendant's monthly disposable income from
28 each payor;
29 e. That the defendant understands that withholding, if
30 implemented, will apply to the defendant's current payors and
31 all subsequent payors and will be continued until terminated
32 pursuant to G.S. 15A-1348.5; and
33 f. That the defendant understands that the amount withheld will
34 include an amount sufficient to make current restitution
35 payments, an additional amount toward liquidation of any
36 arreages, and a two-dollar (\$2.00) processing fee to be
37 retained by the employer for each withholding.
38 (2) A written request for withholding shall be filed in the office of the
39 clerk of superior court to which the defendant is directed to make
40 restitution payments. If the request states and the clerk verifies that the
41 defendant is not delinquent, the court may enter an order for
42 withholding without further notice or hearing. If the request states or
43 the clerk finds that the defendant is delinquent, the matter shall be
44 scheduled for hearing unless the defendant in writing waives his right

1 to a hearing and consents to the entry of an order for withholding of an
2 amount the court determines to be appropriate. The court may require
3 a hearing in any case. Notice of any hearing under this subdivision
4 shall be sent to the aggrieved party.

5 (c) Order for Withholding. – If the court finds after hearing evidence that the
6 defendant, at the time of the filing of the motion was, or at the time of the hearing is,
7 delinquent in restitution payments or that the defendant has been erratic in making
8 restitution payments in accordance with G.S. 15A-1348.1(a), or that the defendant has
9 requested that income withholding begin in accordance with G.S. 15A-1348.1(b), the
10 court shall enter an order for income withholding, unless:

11 (1) The defendant proves a mistake of fact; or

12 (2) The court finds that the restitution payments can be enforced and the
13 aggrieved party's right to restitution can be ensured without entry of an
14 order for income withholding; or

15 (3) The court finds that the defendant has no disposable income subject to
16 withholding or that withholding is not feasible for any other reason.

17 If the defendant fails to respond or appear, the court shall hear evidence and enter an
18 order as provided in this section.

19 (d) Notice to Payor and Defendant. – If an order for income withholding is
20 entered, a notice of obligation to withhold shall be served on the payor as required by
21 G.S. 1A-1, Rule 4, Rules of Civil Procedure. Copies of such notice shall be filed with
22 the clerk of court and served upon the defendant by first-class mail.

23 (e) Modification of Withholding. – When an order for withholding has been
24 entered under this section, the district attorney, the defendant, the defendant's probation
25 officer, or the aggrieved party may file a motion seeking modification of the
26 withholding based on changed circumstances. The clerk of court or the court on its own
27 motion may initiate a hearing for modification when it appears that modification of the
28 withholding is required or appropriate.

29 (f) Transmission of Payments. – Unless a court order requires otherwise, the
30 clerk of court shall transmit the restitution payments to the aggrieved party.

31 **"§ 15A-1348.2. Amount to be withheld.**

32 (a) Computation of Amount. – When income withholding is implemented
33 pursuant to this Article, the amount to be withheld shall include:

34 (1) An amount sufficient to make current restitution payments;

35 (2) An additional amount toward liquidation of any arrearages; and

36 (3) A processing fee of two dollars (\$2.00) to cover the cost of
37 withholding, to be retained by the payor for each withholding unless
38 waived by the payor.

39 The amount withheld may also include court costs and attorneys' fees as may be
40 awarded by the court.

41 (b) Limits on Amount Withheld. – Withholding for current restitution payments,
42 arrearages, processing fees, court costs, and attorneys' fees shall not exceed forty
43 percent (40%) of the defendant's disposable income for one pay period from the payor
44 when there is one order of withholding. The sum of multiple withholdings, for current

1 restitution payments, arrearages, processing fees, court costs, and attorneys' fees shall
2 not exceed: (i) forty-five percent (45%) of disposable income for one pay period from
3 the payor in the case of a defendant who is supporting his spouse or other dependent
4 children; or (ii) fifty percent (50%) of disposable income for one pay period from the
5 payor in the case of a defendant who is not supporting a spouse or dependent children.

6 (c) Contents of Order and Notice. – An order or notice for withholding and any
7 notice to a payor of his obligation to withhold shall state a specific monetary amount to
8 be withheld and the amount of disposable income from the applicable payor on which
9 the amount to be withheld was determined. The notice shall clearly indicate that in no
10 event shall the amount withheld exceed the appropriate percentage of disposable income
11 paid by a payor as provided in subsection (b) of this section.

12 **"§ 15A-1348.3. Multiple withholding.**

13 When a defendant is subject to withholding for child support in addition to
14 withholding for restitution, withholding for current child support shall have priority over
15 restitution payments. Where two or more orders for restitution payments exist, each
16 aggrieved party shall receive a pro rata share of the total amount withheld based on the
17 respective restitution orders being enforced.

18 **"§ 15A-1348.4. Notice to payor; payor's responsibilities.**

19 (a) Contents of Notice. Notice to a payor of his obligation to withhold shall
20 include information regarding the payor's rights and responsibilities, the amount of
21 disposable income attributable to that payor on which that withholding is based, the
22 penalties under this section, and the maximum percentages of disposable income that
23 may be withheld as provided in G.S. 15A-1348.2.

24 (b) Payor's Responsibilities. – A payor who has been properly served with a
25 notice to withhold is required to:

- 26 (1) Withhold from the defendant's disposable income and, within 10 days
27 of the date the defendant is paid, send to the clerk of superior court
28 specified in the notice, the amount specified in the notice and the date
29 the amount was withheld, but in no event more than the amount
30 allowed by G.S. 15A-1348.2; however, if a lesser amount of
31 disposable income is available for any pay period, the payor shall
32 either: (i) compute and send the appropriate amount to the clerk of
33 court, using the percentages as provided in G.S. 15A-1348.2, or (ii)
34 request the initiating party to inform the payor of the proper amount to
35 be withheld for that period;
- 36 (2) Continue withholding until further notice from the clerk of superior
37 court;
- 38 (3) Withhold for child support before withholding pursuant to any other
39 legal process under State law against the same disposable income;
- 40 (4) Begin withholding from the first payment due the defendant in the first
41 pay period that occurs 14 days following the date the notice of the
42 obligation to withhold was served on the payor;

1 (5) Promptly notify in writing the probation officer, if the probation
2 officer was the initiating party, or the clerk of superior court if any
3 other party filed the motion for withholding:

4 a. If there is more than one withholding for the defendant;

5 b. When the defendant terminates employment or otherwise ceases
6 to be entitled to disposable income from the payor, and provide
7 the defendant's last known address, and the name and address of
8 his new employer, if known;

9 c. Of the payor's inability to comply with the withholding for any
10 reason; and

11 (6) Cooperate fully with the initiating party in the verification of the
12 amount of the defendant's disposable income.

13 (c) Change in Defendant's Employment. – If the defendant changes employment
14 within the State when withholding is in effect, the defendant shall notify the clerk of
15 court of the change and shall provide to the clerk the name, location, and mailing
16 address of the defendant's new employer. The requirement for withholding shall
17 continue, and the clerk shall serve a notice of obligation to withhold according to the
18 terms of the withholding order on the new employer and on the defendant. If the
19 defendant or payor gives notice that an adjustment to the withholding order, other than
20 the change in payor, is needed, the matter shall be scheduled for hearing before a judge
21 who shall make any necessary adjustments to the withholding.

22 (d) Withholding for Two or More Defendants. – The payor may combine
23 amounts withheld from two or more defendants' disposable incomes in a single payment
24 to each clerk of superior court if the payor separately identifies by name and case
25 number the portion of the single payment attributable to each individual defendant and
26 the date that each payment was withheld from the individual defendant's disposable
27 income.

28 (e) Prohibited Conduct by Payor; Civil Penalty. – Notwithstanding any other
29 provision of law, when a court finds, pursuant to a motion in the cause filed by the
30 initiating party joining the payor as a third-party defendant, with 30 days notice to
31 answer the motion, that a payor has willfully refused to comply with the provisions of
32 this section, such payor shall be ordered to commence withholding and shall be held
33 liable to the initiating party for any amount which such payor should have withheld,
34 except that such payor shall not be required to vary the normal pay or disbursement
35 cycles in order to comply with these provisions.

36 A payor shall not discharge from employment, refuse to employ, or otherwise take
37 disciplinary action against any defendant solely because of the withholding. When a
38 court finds that a payor has taken any of these actions, the payor shall be liable for a
39 civil penalty to be paid to the county school fund. For a first offense, the civil penalty
40 shall be one hundred dollars (\$100.00). For second and third offenses, the civil penalty
41 shall be five hundred dollars (\$500.00) and one thousand dollars (\$1,000), respectively.
42 Any payor who violates any provision of this subsection shall be liable in a civil action
43 for reasonable damages suffered by a defendant as a result of the violation, and a
44 defendant discharged or demoted in violation of this paragraph shall be entitled to be

1 reinstated to his former position. The statute of limitations for actions under this
2 subsection shall be one year pursuant to G.S. 1-54.

3 **§ 15A-1348.5. Termination of withholding.**

4 A requirement that income be withheld for restitution payments shall promptly
5 terminate as to prospective payments when the payor receives notice from the court or a
6 defendant's probation officer that:

7 (1) The order requiring the payment of restitution has expired or become
8 invalid;

9 (2) The initiating party, the defendant, and the district court judge agree to
10 termination because there is another adequate means to collect
11 restitution or arrearages; or

12 (3) The whereabouts of the aggrieved party are unknown, except that
13 withholding shall not be terminated until all valid arrearages to the
14 State are paid in full."

15 Sec. 3. This act becomes effective October 1, 1993, and applies to offenses
16 committed on or after that date.